Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 2010

LESLIE SMITH,

Petitioner,

v.

PSYCHIATRIC SOLUTIONS, INC., ET AL.

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD E. JOHNSON
Counsel of Record
314 West Jefferson St.
Tallahassee, Florida 32301
(850) 425-1997
richard@nettally.com

QUESTIONS PRESENTED

1. Does the Sarbanes-Oxley Act follow a securities law model that views the entities within a family of companies as an integrated unit rather than a labor law model that views those units as separate and distinct, even where their operations intersect?

2. Does a Sarbanes-Oxley plaintiff's successful exhaustion of pre-suit administrative procedures as to one entity within a family of companies count as exhaustion as to the related companies?

3. Does a Sarbanes-Oxley plaintiff's status as an employee of one entity within a family of companies count as employee status in the related entities?

4. Where a plaintiff suffers new Sarbanes-Oxley retaliation during litigation, may she amend her complaint to reflect the new offenses as under Title VII law, or must she go through a new proceeding with a new administrative exhaustion?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here are Petitioner Leslie Smith and Respondents Psychiatric Solutions, Inc., Premier Behavioral Systems, Inc., and Gulf Coast Treatment Center, Inc.

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DECISIONS BELOW

The December 21, 2009, order of the Eleventh Circuit Court of Appeals, affirming summary judgment, which is not officially reported, is reproduced as Appendix A at 1a. The March 31,2009, judgment for defendants in the U.S. District Court for the Northern District of Florida, which is not officially reported, is reproduced as Appendix B at 7a. The March 31, 2009, order granting summary judgment for defendants in the U.S. District Court for the Northern District of Florida, which is not officially reported, is reproduced as Appendix C at 9a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on December 21, 2009. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The pertinent provision of § 806 of the Sarbanes-Oxley Act is codified at 18 U.S.C. § 1514A:

§ 1514A. Civil action to protect against retaliation in fraud cases

(a) Whistleblower protection for employees of publicly traded companies.--No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)),

or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee–

> **(1)** to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
>
> **(A)** a Federal regulatory or law enforcement agency;
>
> **(B)** any Member of Congress or any committee of Congress; or
>
> **(C)** a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> **(2)** to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the

employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) Enforcement action.--

(1) In general.--A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by--

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) Procedure.--

(A) In general.--An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) Exception.--Notification made under

section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) Burdens of proof.--An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) Statute of limitations.--An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

(c) Remedies.--

(1) In general.- An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) Compensatory damages.--Relief for any action under paragraph (1) shall include--

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees,

and reasonable attorney fees.

(d) Rights retained by employee.--Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

STATEMENT OF THE CASE

Petitioner seeks certiorari to reverse misinterpretations of the Sarbanes-Oxley Act (SOX) that have substantially nullified an important act of Congress in this and other cases. Petitioner seeks to establish that SOX is primarily a securities law rather than a labor law in its unitary treatment of the entities within a family of corporations. Accordingly, successful exhaustion of pre-suit administrative procedures for one entity within the corporate group counts as exhaustion for the related companies; in the same regard, an employee of one company in the group is an employee of all.

The district court declined to reach the merits of the Sarbanes-Oxley (SOX) claim. Instead, the court granted summary judgment on two threshold issues, exhaustion and employer status, both arising from the relationships among the three Respondent corporations.

Gulf Coast Treatment Center, Inc. (GCTC) is owned by Premier Behavioral Systems, Inc. (PBS), which is owned by Psychiatric Solutions, Inc. (PSI). Only the latter is publicly traded.

The three companies play inter-related roles in operating a juvenile detention facility in Ft. Walton Beach, Florida, at which Petitioner was employed as a therapist. Petitioner witnessed unlawful physical abuse by staff and received reports and other evidence of Medicaid fraud, unlawful forced medication, and peer sexual abuse. She made internal objections on

these matters, orally and in writing, up her chain of command and, in some cases, to outside authorities. Petitioner was fired as a result of her opposition to the unlawful conduct and her reports and complaints.

Petitioner sought relief under SOX . Since the parent company, PSI, is the only publicly traded company in the group, Petitioner named only PSI in her complaint with the Occupational Health & Safety Administration (OSHA). In order to bring a claim under SOX, an employee must first file a complaint with OSHA and afford OSHA the opportunity to resolve the allegations administratively. If OSHA fails to render a decision within 180 days, a complainant may sue in federal court. That happened in this case.

Petitioner amended the SOX claim into an pending state-court lawsuit. Respondents removed to the U.S. District Court for the Northern District of Florida under 28 U.S.C. § 1441(b) because addition of the SOX claim created federal-question jurisdiction.

Because Petitioner did not name the two subsidiary corporations in her OSHA complaint, the trial court held, on motion for summary judgment, that she failed to exhaust her pre-suit requirements as to those two companies. Next, the court held that the two subsidiaries were Petitioner's employers, but the parent company, PSI, was not. Thus the court eliminated the SOX count with a one-two punch – failure to exhaust as to the subsidiaries, lack of an employment relationship with the parent.

The court of appeals additionally found, without

explanation, that Petitioner did not engage in conduct protected by SOX. The district court did not reach that question and Petitioner therefore did not brief it. It is a question to be addressed on remand.

Before summary judgment, Petitioner sought leave to amend the SOX count of her complaint to seek redress for some recent retaliation that had occurred during the litigation, but not in the context of it. Respondents had sought retaliatory prosecution of Petitioner. The district court held first, that a SOX plaintiff must go back through OSHA with new offenses rather than amending the existing complaint and, second, that SOX protects only present employees, not former ones. The court of appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. Sarbanes-Oxley Views the Entities Within a Family of Corporations As An Integrated Unit Rather Than a Group of Distinct Units

Section 806 of the Sarbanes-Oxley Act (SOX) (codified at 18 U.S.C. § 1514A) prohibits publicly traded companies or any officer, employee, contractor, subcontractor, or agent of such company from retaliating against a whistleblower who engages in a protected activity. The court below joins some other courts as well as some Department of Labor Administrative Law Judges in construing this provision to deny protection to employees of non-publicly traded, wholly-owned subsidiaries of

publicly traded companies. These decisions basically theorize that the publicly traded parent is not the whistleblower's employer, and the subsidiaries are not publicly traded; therefore, wholly owned subsidiaries are not subject to SOX.

It is more than anecdotal perception that administrative and judicial misapplication of SOX coverage has substantially nullified the most important protection against corporate fraud that Congress has provided. Empirical evidence supports that claim. Richard Moberly, Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, 49 Wm. & Mary L. Rev 65 (2007). Professor Moberly reports the results of an empirical study of all Department of Labor determinations under Sarbanes-Oxley from the date of enactment in 2002 through July, 2006, consisting of over 700 separate decisions. Professor Moberly reported a dismissal rate in excess of 90%, and that administrative decisions: "... misapplied Sarbanes-Oxley's substantive protections to the significant disadvantage of employees." Moberly at 135, fns. 285-290 and accompanying text.

Many of the dismissals have stemmed from the error of viewing SOX through the filter of labor law rather than regulatory law. The labor law perspective views parent-subsidiary liability as derivative while the regulatory law approach views that liability as direct. In the labor law tradition, a parent or subsidiary needs to be affirmatively and substantially involved in the conduct at issue to be tagged with the liability of another member of the corporate family. In

some fact scenarios, analysis may proceed under the SOX statutory provision establishing parent liability for the conduct of an "agent." By contrast, in the regulatory tradition, parent liability for subsidiary conduct is direct and virtually automatic. The subsidiary may be liable, though not publicly traded, and the parent may be liable, though not expressly involved in the offending conduct. Most SOX cases have progressed through the Department of Labor administrative tribunals, where the labor-law framework is often explicit. *See, e.g.*, Gale v. World Financial Group, 2006 SOX 00043, (ALJ, June 9, 2006) (parent will be liable only where it controls the work environment or the termination decision). The instant case shows an example of the same view migrating into the smaller number of SOX cases handled in the district courts. One of the foci of the appellate proceeding in the instant case was the extent to which Petitioner could marshal, and the court could resist recognition of, indicia of her status as an employee of the parent as well as the subsidiaries. That is a struggle that should never happen if we are faithful to the intent of Congress.

SOX is for the protection primarily of stockholders rather than employees who blow the whistle. Employee protection for exposure of corporate wrongdoing is merely the vehicle by which Congress sought to protect shareholders, not an end in itself. The separate identity between a corporation and its stockholders and the separation between the various entities within a corporate family under general corporate law is designed to limit the shareholders' exposure and the companies' exposure to the tort and

other suits of third parties. But in drafting SOX, Congress learned that separate corporate identities and the immunities, veils, and barriers arising from those separate identities were precisely the vehicles which were used to harm shareholders in the collapse of companies such as Enron, Worldcom, and Global Crossing – failures that led to the passage of SOX. This history and purpose is set forth in illuminating detail in the seminal ALJ decision, Walters v. Deutsche Bank AG, 2008-SOX-70 (ALJ March 23, 2009).

Walters further illustrates the point that SOX, operating from a securities regulation perspective rather than a corporate-law or labor-law framework, is concerned with the financial reporting and control relationships among the companies in the corporate family rather than the relationships from the perspective of cross-company personnel management.

Whatever utility the separate-entities framework of corporate liability may have in labor law, it is alien to anti-fraud law and securities law. This Court has set aside the separate-entities principle of corporate law when dealing with parent and subsidiary relationships under circumstances in which the Court finds such common law principles inconsistent with the policy focus of a Congressional enactment. In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), this Court declined to accept as separate entities a parent and its wholly owned subsidiary for purposes of a conspiracy to violate anti-trust law. This Court found that parent and subsidiaries "are not unlike a multiple team of horses drawing a vehicle under the control of a

single driver." Id. at 771. Building on that principle, the Walters decision observes that, for Sarbanes-Oxley purposes, the legal form of an operating unit is of little consequence; a wholly owned subsidiary is no more distinct from its parent than a division or operating unit.

> Under circumstances in which the corporate law principles which afford parent companies identities distinct from their subsidiaries conflict with the policies or purposes which underlie a congressional enactment, the courts have not hesitated to dispense with the concept of separateness and view the parent and subsidiaries as a single corporate entity. For example, a majority of the Circuits have declined to treat parent companies separate and distinct from their subsidiaries for RICO purposes.

Walters v. Deutsche Bank AG, 2008-SOX-70, 18-19 n.18 (ALJ March 23, 2009) (collecting cases).

Treating the entities within a family of companies as a unit for SOX purposes also comports with traditional and customary statutory interpretation. Under Section 806 of SOX, 18 U.S.C. §1514A, a covered company is defined as a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 [15 U.S.C. § 78l], or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. § 78o(d)]." This is a securities law definition – not a labor

law definition.

The same principle applies to coverage definitions in other federal whistleblower statutes, *i.e.*, an "air carrier" comes from the FAA definition, (see the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121); "commercial motor carrier" comes from the DOT definition (The Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105); "licensee of the Commission" comes from the NRC definition (Energy Reorganization Act of 1978 (ERA), 42 U.S.C. § 5851).

Definitions of covered companies and jurisdiction arise from the general provisions of the various statutes, in the case of SOX, from the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*. When jurisdiction is established from the general provisions of the Act, employment law is applied only to the burdens of proof and elements of an alleged violation in whistleblower cases, not the identity of the parties.

For years, the SEC and private litigants have successfully used Section 20(a) of the Securities Exchange Act of 1934 to assert jurisdiction over parents, their subsidiaries, and various individuals. A security registered under Section 12(b)(1) "shall" contain in the registration statement, "Such information, in such detail, as to the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer ... ." This means subsidiaries, directly or indirectly controlled, are included in the registration of the issuer. Therefore, 1) the parent and subsidiary are

jointly and severally liable under section 20(a) of the Exchange Act for a violation of section 806 of SOX; 2) that a subsidiary of a publicly-traded parent is part of the §12 registration of the parent; 3) that a subsidiary of a publicly traded parent is part of the §15(d) reporting requirement of the parent.

Accordingly, Congress intended under SOX that parent and subsidiary corporations are a single unit for purposes of administrative exhaustion and employer status.

II. A SOX Plaintiff Need Not Re-Exhaust Pre-Suit Stages To Amend A Complaint To Seek Redress For New Offenses

The district court denied Petitioner's motion for leave to amend her complaint to add a count under SOX for more recent retaliation. The need for the additional SOX count arose late in the litigation, when the employer made a retaliatory and frivolous complaint to a state agency seeking to have Petitioner arrested for an alleged breach of statutory confidentiality. This led Petitioner to seek to add another SOX count.

The court's two rationales for denying the SOX amendment were that SOX does not protect former employees from retaliation and that each new retaliatory offense requires a plaintiff to undergo a whole new pre-suit regimen at OSHA before coming to court.

A plaintiff is not required to go back through OSHA to exhaust prerequisites anew, over and over --

in the middle of litigation – each time the employer inflicts a new actionable offense. The various circuits have strong analogous Title VII authority saying there is no additional exhaustion required for suing on post-charge retaliation. Gupta v. East Texas State University, 654 F.2d 411, 414 (5th Cir. 1981); Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 168-169 (11th Cir. 1988). There is no reason for a different analysis to apply to SOX cases where the OSHA exhaustion is comparable to the EEOC exhaustion in Title VII.

A case cited in the district court order says that this line of Title VII authority did not survive National Railroad Passenger Corporation v. Morgan, 536 U.S. 101 (2002). Willis v. Vie Financial Group, Inc., 2004 WL 1774575 (E.D. Pa. August 06, 2004) (SOX plaintiff must file new OSHA charge for each new offense). One court of appeals has read Morgan the same way. Martinez v. Potter, 347 F.3d 1208, 1210-11 (10th Cir.2003). Morgan held that a plaintiff must have included each discrete act that constitutes a claim for relief in an EEOC charge in order to recover on it. But Morgan claimed not to alter existing law. Morgan looks backward, not forward. It bars a plaintiff from seeking relief under the old "continuing violation" theory under which a charge could embrace all the actionable offenses of a similar kind that preceded it, even if they were otherwise time-barred. But Morgan says nothing, expressly or by implication, about over-ruling the substantial body of precedent around the nation that excuses a plaintiff who has already completed administrative exhaustion from re-exhausting before amending in a new offense. The policy rationale of Morgan is to prevent revitalization of stale claims.

That justifies barring old claims that were never exhausted, but it can not justify putting fresh claims through a pointless steeplechase that keeps the old claims from connecting with the new when the parties are already in court.

Such a requirement would be waste and burden enough in the SOX cases that remain in the Department of Labor for the entire course, where they could be stayed and merged as each new successor offense came along. But it is particularly onerous where the case migrates to court after OSHA exhaustion and can not await the ripeness of the new offenses.

In five recent cases this Court has made clear its intention to sweep aside impediments to redress of retaliation claims. Crawford v. Metro. Gov't of Nashville & Davidson County, 129 S. Ct. 846 (2009) (Title VII's "opposition" clause prohibits retaliation against an employee whose statement to employer's own investigators corroborates another employee's allegation of harassment); Gomez-Perez v. Potter,553 U.S. 474 (2008) (statute prohibiting "discrimination on the basis of age" against federal employees implicitly includes prohibition against retaliation); CBOCS W., Inc. v. Humphries,553 U.S. 442 (2008) (Reconstruction Era civil rights law guaranteeing that all persons shall have the same right "to make and enforce contracts . . . as is enjoyed by white citizens" implicitly includes a prohibition against retaliation against those who complain of violations of this provision); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (regarding what adverse actions violate an explicit

anti-retaliation provision in federal employment discrimination law); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (finding that a federal prohibition against discrimination in education implicitly prohibits employer retaliation against employees who report such discrimination). In Gomez-Perez, CBOCS, and Jackson, this Court found protection against retaliation even in the absence of an explicit statutory basis. It follows with stronger reason that this Court would not subscribe to a gymnastic reading of Morgan that would set up a shell game at the end of a steeplechase for an employee seeking redress for retaliation during litigation.

III. SOX Protects Former Employees

In addition to the re-exhaustion rationale for denial of amendment, the district court found that former employees do not have rights under SOX. In other words, Respondents had fired Petitioner before the last retaliatory act and had, in so doing, won themselves immunity for that retaliation. This is wrong as matter of codified regulation and as a matter of this Court's policy regarding retaliation against former employees.

The regulations implementing SOX define an employee as "an individual presently **or formerly working** for a company or company representative . . . or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1801.101 (emphasis added). This comports with the general run of retaliation law. In deciding the applicability of the retaliation provision of Title VII to

former employees as well as current employees, this Court contemplated just this sort of situation in rejecting a limitation on protection of former employees that would "provide a perverse incentive for employers to fire employees who might bring Title VII claims." Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

CONCLUSION

Lower courts and the administrative tribunals within the Department of Labor have erected procedural and definitional hurdles that are gutting the centerpiece of the protections Congress adopted against corporate fraud, the Sarbanes-Oxley Act. This is a matter of great public importance that has grown even more important in the economic crisis of the last two years. The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/s/Richard E. Johnson
Richard E. Johnson
Counsel of Record
Law Office of Richard E. Johnson
314 West Jefferson St.
Tallahassee, FL 32301
(850) 425-1997
(850) 561-0836 (facsimile)
richard@nettally.com

APPENDIX A

IN THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-12233

D. C. Docket No. 08-00003-CV-3-MCR/EMT

[Filed December 21, 2009]

[DO NOT PUBLISH]

LESLIE SMITH
Plaintiff-Appellant,

versus

PSYCHIATRIC SOLUTIONS, INC.
PREMIER BEHAVORIAL SOLUTIONS, INC.
GULF COASTTREATMENTCENTER, INC.
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Florida

Before: DUBINA, Chief Judge, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

In this appeal, Plaintiff/Appellant Leslie Smith ("Smith") alleges that she was terminated from her employment with Defendant/Appellees Psychiatric Solutions, Inc. ("PSI"), Premier Behavioral Solutions, Inc. ("PBS"), and Gulf Coast Treatment Center, Inc. ("GCTC"), in retaliation for complaining about the physical abuse and Medicaid fraud that she witnessed or otherwise became aware of at Appellees' juvenile detention facility, in violation of Florida's whistle-blower statute and the Sarbanes-Oxley Act of 2002.

After a period of extensive and contentious discovery, the district court granted summary judgment in favor of the defendants. The district court also entered an order denying Smith's motion for leave to amend her complaint and upheld a magistrate judge's imposition of sanctions on Smith's lawyer, Richard E. Johnson. Finally, the court entered orders denying Smith's motions to compel discovery.

The issues presented on appeal are:

(1) Whether the district court erred in granting summary judgment in favor of Appellees on Smith's state law claim.

(2) Whether the district court erred in granting summary judgment in favor of Appellees on Smith's Sarbanes-Oxley claim.

(3) Whether the district court erred in denying Smith's motion to amend her complaint.

(4) Whether the district court erred in upholding the Magistrate Judge's imposition of sanctions on Smith's attorney, Mr. Johnson.

(5) Whether the Magistrate Judge and/or the district court erred in denying Smith's motions to compel discovery.

This court reviews a district court's grant of summary judgment *de novo*, applying the same legal standards used by the district court. *Kingsland v. City of Miami*, 382 F.3d 1220, 1225 (11th Cir. 2004). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(c)). This court views the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and resolves all reasonable doubts about the facts in favor of the non-movant. *Id.*

This court reviews a district court's decision to disallow amendment of a complaint after the deadline established in its pretrial order for abuse of discretion. *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998) (quoting *Santiago*

v. Lykes Bros. Steamship Co., 986 F.2d 423, 427 (11th Cir. 1993)). "[W]hen a motion to amend is filed after a scheduling order deadline, Rule 16 is the proper guide for determining whether a party's delay may be excused." *Id.* At 1418 n.2. That rule requires a showing of "good cause" for modification of the deadlines in the scheduling order. Fed. R. Civ. P. 16(b)(4).

This court's review of the imposition of sanctions under Rule 37 "is sharply limited to a search for an abuse of discretion . . ." *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1048 (11th Cir. 1994), except for Mr. Johnson's due process claim, which is reviewed *de novo. Id.* at 1050.

This court reviews the denial of a motion to compel discovery for an abuse of discretion. *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 837 (11th Cir. 2006).

As to the district court's grant of summary judgment in favor of the Appellees on Smith's state law retaliation claim, we conclude from the record that the district court correctly applied the actual violation standard as opposed to the good faith belief standard.[1] However, even if the good faith belief standard is, in fact, the correct standard to apply, and even if Smith can establish a prima facie case of retaliation, she has not presented "significantly probative" evidence of pretext and,

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[1] Accordingly, we deny Appellant's Motion to Certify Question to the Florida Supreme Court.

therefore, summary judgment was properly granted in favor of the Appellees.

As to the district court's grant of summary judgment in favor of Appellees on Smith's Sarbanes-Oxley whistle-blower claim, we conclude that Smith has failed to produce evidence demonstrating that she engaged in conduct protected under Sarbanes-Oxley.[2] Accordingly, we conclude summary judgment was appropriate on this claim.

Concerning Smith's contention that the district court erred in denying her motion to amend her complaint, we first conclude that Smith did not include this issue in her notice of appeal and, therefore, has waived it on appeal. However, even if we reached the merits of Smith's arguments, we would affirm the district court's order. Specifically, as to the district court's denial of Smith's proposed new state law claim, we conclude the district court did not abuse its discretion because Smith did not show "good cause" to amend her complaint outside of the scheduling order's time frame. As to her proposed new Sarbanes-Oxley claim, because Smith did not allege an adverse employment action, we conclude that the district court did not abuse its discretion. Accordingly, we affirm the district court's order denying Smith's motion to amend her complaint.

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[2] Even if Smith had engaged in protected conduct, the district court was correct in dismissing her claim on the basis that Smith failed to exhaust her administrative remedies with respect to PBS and GCTC and was not an employee of PSI.

As to the imposition of sanctions against Mr. Johnson, we conclude that the district court correctly imposed sanctions because they were authorized by the Federal Rules of Civil Procedure and because, by putting Mr. Johnson on notice of the sanctions and giving him the opportunity to object, due process was satisfied. After reading Mr. Johnson's memorandum in opposition to sanctions, we find that he was given a full and fair opportunity to respond.

Finally, we uphold the district court's orders denying Smith's motions to compel discovery. Again, Smith did not include these orders in her notice of appeal and, therefore, she has waived this issue on appeal. However, even if we were to reach the merits of this issue, we would conclude that there was no error. As to the denial of Smith's Rule 37 motion to compel discovery, the magistrate judge did not abuse her discretion where she specifically listed each of Smith's discovery requests and gave legitimate reasons for denying them. As to the denial of Smith's Rule 56(f) motion to reopen discovery, we conclude that the district court did not abuse its discretion where the appellees submitted evidence that they had produced all non-privileged documents sought by Smith, and where the district court concluded, after an in-camera inspection, that the documents not produced were, in fact, privileged.

For the above-stated reasons, we affirm the district court's grant of summary judgment and its orders referenced in this opinion.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

LESLIE SMITH
Plaintiff-Appellant,

versus

PSYCHIATRIC SOLUTIONS, INC., ET Al
Defendants-Appellees.

Case No. 3:08cv3 MCR/EMT

[Filed March 31, 2009]

JUDGMENT

This action came before the Honorable M. Casey Rodgers and a decision has been rendered.

Judgment is hereby entered for Defendants, PSYCHIATRIC SOLUTIONS, INC, PREMIER BEHAVIORAL SOLUTIONS, INC. and GULF

COAST TREATMENT CENTER, INC. Plaintiff, LESLIE SMITH, shall take nothing from this action.

WILLIAM M. McCOOL, CLERK OF COURT

March 31, 2009
DATE

/s/ Lynn C. Uhl
Deputy Clerk: Lynn Uhl

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

LESLIE SMITH
Plaintiff-Appellant,

versus

PSYCHIATRIC SOLUTIONS, INC.
PREMIER BEHAVORIAL SOLUTIONS, INC.
GULF COAST TREATMENTCENTER, INC.
Defendants-Appellees.

Case No. 3:08cv3 MCR/EMT

[Filed March 31, 2009]

ORDER

This is an action for retaliatory discharge under the Sarbanes-OxleyAct,18 U.S.C. § 1514A, and the Florida Whistle-Blower Act, Fla. Stat. §§ 448.101, *et. seq.* Plaintiff Leslie Smith worked as a therapist

for less than four months at a privately-run treatment center for juvenile delinquents owned and operated by defendants. She claims that during the time of her employment she uncovered serious physical and sexual abuse of youths at the facility, Medicaid fraud, and a suspiciously altered medication form. She further claims that immediately after complaining about the altered medication form to the center's management, she was escorted from the premises and terminated. Smith believes she was terminated for blowing the whistle on defendants' illegal practices. Defendants maintain Smith was terminated for her unprofessional conduct, violation of the therapist/patient boundary, and her refusal to follow internal policies.

Gulf Coast Treatment Center operates a corrections program for delinquent youths court-ordered to attend the program. The program and the physical facility itself are both generally known as Gulf Coast Youth Academy ("GCYA"). GCYA is operated under contract with the Florida Department of Juvenile Justice ("DJJ"). Both DJJ and the Florida Department of Children and Families ("DCF") have regulatory jurisdiction over GCYA.[1]

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[1] The corporate structure of the defendants is significant in this case. Defendant Psychiatric Solutions, Inc. ("PSI"), is a publicly traded company. Its subsidiary, Defendant Premier Behavioral Solutions, Inc. ("PBS"), has a contract with the Florida Department of Juvenile Justice to operate a program called Gulf Coast Youth Academy ("GCYA"), which is located in a Fort Walton Beach facility owned by Defendant Gulf Coast Treatment Center, Inc. ("GCTC"). Gulf Coast Youth

On January 10, 2006, Smith was hired by GCTC to work at GCYA as an unlicensed therapist. She claims that shortly thereafter she became aware of the wrongful or illegal conduct noted above for which she contends the defendants were responsible. She maintains she reported some of these incidents to the state and to GCYA's management. These incidents are summarized here.

Services ("GCYS") is a fictitious name for GCTC. Thus, PSI own PBS, which owns GCTC.

Defendants' memorandum and statement of facts contain a confusing paragraph claiming that PSI owns "Behavioral Solutions, Inc.," which owns "Premier Behavioral Solutions of Florida, Inc. ('PBSI')," which owns GCTC. Defendants' memorandum and statement of facts contain a confusing paragraph claiming that PSI owns "Behavioral Solutions, Inc.," which owns "Premier Behavioral Solutions of Florida, Inc. ('PBSI')," which owns GCTC. Thus, according to defendants, there are four corporations in the hierarchy; however, this assertion is not supported by the testimony of Jeff Kaplan, GCTC's CEO, who says PSI owns PBS, which owns GCTC. Other than in these paragraphs, Behavioral Solutions, Inc. and PBSI are never referred to again.

Kaplan also testified that GCYA was "not a corporation" or an "entity in its own right," but rather "a contract with the Department of Juvenile Justice." GCYA is also used as the name of the GCTC facility where the contract is carried out. Regrettably, defendants refer in some places to GCYA as if it actually were a corporation ("PSI was not her employer and GCYA and PBS are not covered by [Sarbanes-Oxley]"; "[a]ll of the purported wrongdoers are employed by GCYA." Defs.' Mem., doc. 75-2, at 14, 13). Given defendants' argument that only one corporation is subject to a Sarbanes-Oxley claim, clearer references to corporate entities would have aided the court's understanding of the facts.

Sexual and physical abuse. Smith claims she learned in February 2006 that a youth was being routinely sexually assaulted by another youth and reported this to GCYA's Program Director and its Licensed Clinical Therapist on February 23, 2006. Smith believes these individuals failed to report the sexual assaults to DJJ as required by DJJ's policy. On March 17, 2006, Smith claims she reported an incident of physical abuse involving another youth and GCYA staff to DCF. According to Smith, this youth indicated he had been beaten by GCYA staff and another youth, and was not permitted to report the incident to DCF. On March 21, 2006, GCYA's Program Director held a staff meeting wherein he "strongly encouraged" GCYA staff to give management advance notice before reporting complaints to the state so that GCYA would have time to investigate and resolve complaints before the state officials got involved. Smith believed that by observing this policy she would violate her mandatory duty to report any abuse. For this reason, Smith says she ignored the Program Director's instruction and reported physical abuse to DCF and/or DJJ six times between March 22, 2006 and May 1, 2006. Smith alleges she also made reports of physical abuse to members of GCYA management.

Medicaid fraud. Smith claims that on one occasion, GCYA's Licensed Clinical Therapist ordered her to falsely sign a log documenting that Smith had been supervised on a day when she had not. Smith believes this log is submitted to the

state's Medicaid program for reimbursement, and therefore GCYA's submission of a false log constitutes fraud. Smith also insists that GCYA was billing Medicaid for services that never occurred and that she repeatedly objected to GCYA's submission of false documentation in this regard. Smith also complains that weekend groups were supervised by direct care staff rather than therapists, which she also believes is against Medicaid's rules, but she concedes she does not know for certain whether this constitutes a violation of the rules.

Refusal of medication form. Smith also claims that on or about May 2, 2006, she discovered a youth's "refusal of medication" form which she believed had been altered. Defendants and Smith disagree as to whether youths are disciplined for refusing to take medication. According to defendants, although GCYA staff must document a youth's refusal to take medications to create an accurate medical record for doctors and courts, the youth is not disciplined. Smith alleges that not only are the youth disciplined for refusing medication, but the very existence of the form itself violated youths' civil rights because of its language implying that punishment will be given for refusal.[2]

On May 5, 2006, Smith questioned a nurse about the allegedly altered form. The record reflects this was a confrontation, but there is a factual dispute as to whether it occurred in front of a youth. After

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[2] The record does not contain a copy of the form.

the argument, Smith was escorted from the premises and told she was suspended. On May 8, 2006, GCTC notified Smith in writing that she had been terminated.

Smith claims she was terminated for reporting the systematic fraud and abuse that took place at the GCYA facility to DCF, DJJ, and to GCYA's management team. In response, defendants insist Smith's four months at the GCYA facility were turbulent and rife with argument and disagreement over many of GCYA's policies. GCTC's chief executive officer, Jeff Kaplan, who made the decision to fire Smith, testified he did so on the basis of multiple incidents and complaints regarding Smith he received from employees, including members of his management team. In one such incident, which particularly disturbed Kaplan, Smith claimed to have witnessed a serious act of sexual aggression by one youth against another on a security tape she reviewed. According to Kaplan, other GCYA staff saw nothing on the tapes; additionally, DCF investigated and found the claim unsubstantiated. Kaplan stated he terminated for Smith for other reasons as well, including her conduct in agreeing to mail a letter for a youth to someone not on the youth's correspondence list and to secretly give the reply to the youth; spreading untrue rumors among the youths about the reasons other staff members had left the facility and falsely claiming that two staff members had been dishonorably discharged from the military; regularly challenging management in front of other staff during meetings; and violating

the therapist/patient boundary by "acting out in front of kids" when she questioned a nurse in front of a youth about the allegedly altered medication form.

After her termination, Smith filed an administrative complaint with the Occupational Safety and Health Administration ("OSHA") naming PSI only. (Doc. 75-8, at 105–09). According to the complaint, by reporting the above acts of fraud and abuse, and by objecting to these acts, Smith engaged in protected activity under the whistleblower provision of Section 806 of the Corporate and Criminal Fraud Accountability Act, also known as the Sarbanes-Oxley Act. This statute prohibits retaliation against an employee who reports violations of the fraud provisions of the Sarbanes-Oxley Act, rule or regulation of the Securities and Exchange Commission, and/or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. She also alleged that based on her complaints "PSI's investors unknowingly purchased stock in a company whose potential for civil lawsuits and even criminal liability were much greater than advertised." Smith asserted she was terminated by PSI in retaliation for her whistleblowing activity.

OSHA conducted an investigation, responding with a final report dated January 8, 2007 (doc. 77-2), in which it concluded that Smith's complaint did not fall within the scope of Sarbanes-Oxley, because "[Smith] brought to light incidents of abuse against youths in a correctional setting, which does

not constitute violations of" any of the laws or rules enumerated in 18 U.S.C. § 1514A, and thus dismissed her complaint.[3]3 Smith then filed a complaint in state court, which included her claim under Sarbanes-Oxley and a new claim for violation of the Florida Whistle-Blower Act. Defendants removed the action to this court on January 2, 2008, and have now moved for summary judgment. Before proceeding to the summary judgment motion, the court resolves several preliminary matters.

Striking of Second Amended Complaint

On October 7, 2008, Smith moved for leave to amend her First Amended Complaint to supply the correct name for GCTC rather than referring to GCYA, and to add two additional claims for retaliation. On November 5, 2008, the court granted the motion to correct GCTC's name but denied the motion to amend in all other respects. Smith's Second Amended Complaint remains in the court's electronic file and defendants have not answered it. The court notes that, in addition to adding two new claims, the Second Amended Complaint also added new factual information, changes Smith did not seek or receive leave of court to make. Thus, the Second Amended Complaint is STRICKEN from the court's docket, and the court proceeds on the First Amended Complaint with the exception of treating that complaint as though all

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[3] OSHA also questioned whether Smith's employer, GCTC, was covered by Sarbanes-Oxley, but declined to address this issue because of its finding that Smith's conduct was not covered under the act.

references to Gulf Coast Youth Academy were made to Gulf Coast Treatment Center, Inc.

Plaintiff's Rule 72 Objections

Plaintiff moved the court to reopen discovery under Fed. R. Civ. P. 56(f). Defendants promptly responded, and plaintiff then filed a motion for leave to file a reply to defendants' response. In her motion, plaintiff argued that discovery should be reopened based on defendants' withholding of information showing that GCTC's CEO Jeff Kaplan had knowledge of plaintiff's protected conduct at the time he made the decision to terminate her. In response, defendants generally argued that they have complied with all requests for discovery materials except the "Schleuss report," which was prepared at the direction of counsel in connection with litigation and is thus privileged. After full briefing on the issue, the magistrate judge denied both of plaintiff's motions. Plaintiff has filed two objections (doc. 131) to the magistrate judge's order under Fed. R. Civ. P. 72(a), both of which the court rejects as meritless.

A magistrate judge's non-dispositive orders will not be reversed unless they are clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a).

Plaintiff's first objection is that the magistrate judge stated no reason for denying her leave to reply although there was good cause to permit one. The rules do not permit a party to file a reply absent a showing of good cause. Loc. R. 7.1(C)(2). This is a factual determination, and therefore the court will not reverse absent a "'definite and firm

conviction that a mistake has been committed.'" *Clark v. Milam*, 155 F.R.D. 546, 547 (S.D.W.Va. 1994) (citations omitted). Plaintiff argued good cause existed because defendants attached "new" evidentiary materials to their opposition to her motion. The evidentiary materials introduced included excerpts from the depositions of Jeffrey Kaplan and Cheryl Schleuss (docs. 93-2 and 93-3) and a new affidavit of defendants' counsel, with attached privilege logs and correspondence between counsel (doc. 94 and exhibits). Except for the affidavit, plaintiff's counsel had previously seen all of this material, and in fact had previously filed the full text of the depositions with the court in violation of Loc. R. 26.2(A). The affidavit contained defendants' counsel's explanation that they had preserved defendants' privilege not to disclose the Schleuss report. The affidavit refers solely to the conduct of counsel and the parties during discovery. It does not justify reopening discovery. Plaintiff further argues that the magistrate judge's summary denial of her motion for leave to reply should cause the court to question whether the magistrate judge's decision "is based on good reason or bad." This argument merits no discussion. The court is satisfied that a summary denial was appropriate here.

Plaintiff also objects that "the magistrate judge erroneously assumed the Schleuss report to be privileged because created in anticipation of litigation." This presents a mixed question of law and fact, which subjects the magistrate judge's decision to *de novo* review. *Regional Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 712 (6th

Cir. 2006); *Cooper-Houston v. Southern Ry. Co.*, 37 F.3d 603, 604 (11th Cir. 1994). Contrary to plaintiff's suggestion, the magistrate judge did not "assume" the report was privileged. Rather, she specifically inspected the report *in camera* and found that it had been prepared at the request of counsel in anticipation of litigation. She also found that the defendants properly preserved their claim of privilege. Having reviewed the report, the court agrees. Generally, absent exceptions not applicable here, communications made by employees to corporate counsel in anticipation of litigation are privileged. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Plaintiff's Rule 72 objections are OVERRULED.

Defendants' Motion to Strike

Defendants move to strike Smith's declaration under Rule 12(f) of the Federal Rules of Civil Procedure, which provides that the court may strike redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). Although the court has considerable discretion in ruling on a motion to strike, motions to strike are generally disfavored. *Chambers v. Cooney*, 535 F. Supp.2d 1255, 1262–63 (S.D. Ala. 2008).

Defendants raise two points in their motion. First, defendants argue that Smith's declaration is invalid because it contains the language: "I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and

belief." Defendants argue that the inclusion of the phrase "to the best of my knowledge and belief" "hedges her knowledge and, in doing so, fails to comply with Fed. R. Civ. P. 56(e)." The court disagrees. The declarations statute, 28 U.S.C. § 1746, does not "mandate strict compliance with the exemplary clause provided in the statute." *Matter of Muscatell*, 106 B.R. 307, 309 (Bankr. M.D. Fla. 1989). The statute itself provides that a declaration must be "substantially" in the form provided: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct." 28 U.S.C. § 1746(2). So long as the declaration contains the phrase "under penalty of perjury" and states that the document is true, the verification requirement is met. *Matsuda v. Wada*, 101 F. Supp.2d 1315, 1322 (D. Haw. 1999).

Defendants also argue that portions of Smith's declaration should be stricken because they are not within her personal knowledge as required by Fed. R. Civ. P. 56(e)(1) and Fed. R. Evid. 602. Defendants object to certain portions of the declaration on grounds that Smith could not have witnessed the events described. For example, in paragraph 18, Smith references weekend group meetings which, at deposition, she conceded she never attended. Defendants object to other portions because they contain Smith's understanding of regulations without any explanation of the basis of her knowledge of those regulations. For example, in paragraph 25, Smith declares that unspecified "[r]egulations" bar the punishment of youths who refuse to take medication.

The court finds that certain of the portions of Smith's declaration are indeed outside the scope of her personal knowledge or are otherwise unduly speculative, but finds it unnecessary to rule on the admissibility of each individual paragraph of the declaration. Much of the declaration is merely repetitive of Smith's own deposition testimony. Moreover, these paragraphs, even if taken as true, do not create a disputed issue of material fact. The only paragraph the court need address is paragraph 23 wherein plaintiff states "GCYA was billing Medicaid for services that never occurred. I repeatedly objected to Hughes of (sic) false documentation of the undelivered service involved." Smith offers no evidentiary support for her understanding of GCYA's billing practices, nor does she explain how she would be in a position to observe the bills sent to Medicaid or monitor the payments received. This statement appears to be entirely outside her personal knowledge.
Defendants' motion to strike is GRANTED as to paragraph 23 and DENIED as moot as to the remainder.

Summary Judgment Motion
Standard of review

A motion for summary judgment should be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d

265 (1986). A factual dispute is "'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing [substantive] law." *Anderson*, 477 U.S. at 248; *Tipton v. Bergrohr GmbH-Siegen*, 965 F.2d 994, 998 (11th Cir. 1992). The court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992) (citation omitted). Nevertheless, a general denial unaccompanied by any evidentiary support will not suffice. Fed. R. Civ. P. 56(e)(2); *see, e.g., Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991); *Hutton v. Strickland*, 919 F.2d 1531 (11th Cir. 1991). Furthermore, the court is not obliged to deny summary judgment for the moving party when the evidence favoring the nonmoving party is merely colorable or is not significantly probative. *See Anderson*, 477 U.S. at 249. To avoid summary judgment, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586.

Indeed, the existence of a scintilla of evidence in support of the nonmovant's position is insufficient; the test is "whether there is [evidence] upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Id.* at 252. The moving party has the initial burden of showing the absence cases for the proposition that Title VII's good faith standard should be imported into the Whistle-Blower Act, but these cases merely hold that the Title VII burden-shifting scheme should be used when analyzing claims; this scheme comes into play only after an employee has identified an actual violation. Two other cases, *Padron v. BellSouth Telecom., Inc.*, 196 F. Supp.2d 1250, 1256 (S.D. Fla. 2002) and *Rivera v. Torfino Enters., Inc.*, 914 So.2d 1087, 1089 (Fla. 4th DCA 2005), involve allegations of acts which, if proven, would of a genuine issue as to any material fact. *See Adickes*, 398 U.S. at 157; *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). Once the movant satisfies its burden of demonstrating the absence of a genuine issue of material fact, the burden shifts to the nonmovant to "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (emphasis omitted). Otherwise stated, the nonmovant must "demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.
1991).

Count I: Florida Whistle-Blower Act

Defendants move for summary judgment on grounds that Smith's activity was not protected by the Whistle-Blower Act, and also that, to the extent Smith did engage in protected conduct, her termination was not in retaliation for any protected activity.

The Whistle-Blower Act prohibits employers from taking adverse action against an employee for: (1) disclosing or threatening to disclose an activity that is in violation of a law, rule, or regulation; (2) providing information to a person conducting an investigation into such an alleged violation by the employer; and (3) objecting to or refusing to participate in any such violation.[4] To prevail on a claim under this statute, a plaintiff must "must prove that the activity, policy or practice objected to is, in fact, in violation of a law, rule or regulation."[5] *White v. Purdue Pharma, Inc.*, 369 F.

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[4] Smith alleges violations under subsections (1) and (3) only.

[5] This does not require Smith on summary judgment to prove that violations occurred, but it does mean she must come forward with some evidence of acts which, if proven, would be actual violations. Smith's argument that she need only show a good faith belief that the employer's conduct or policy violates the law is incorrect and her reliance on *Golf Channel* is seriously misplaced. The *Golf Channel* court did not construe the entire whistle-blower statute—indeed, the decision was limited to the question of whether an employee must give written notice under all three subsections or only subsection (1). *Id.* at 563. *Golf Channel* says nothing about whether the employee must show actual violations of the law as opposed to merely a good faith belief violations occurred.

Smith cites several other cases in support of her position, but they are equally inapposite. She cites some cases for the proposition that Title VII's good faith standard should be

Supp.2d 1335, 1337 (M.D. Fla. 2005); *United States* ex rel. *Vargas v. Lackmann Food Svc., Inc.*, 510 F. Supp.2d 957, 968 (M.D. Fla. 2007). *See also Taylor v. Memorial Health Systems, Inc.*, 770 So.2d 752, 754 (Fla. 5th DCA 2000) (applying actual violation standard). "Law, rule, or regulation," refers to federal, state, or local statutes, ordinances or regulations formally "adopted" by an appropriate body, which are applicable to the employer and pertain to the employer's business. *See New World Communications of Tampa, Inc. v. Akre*, 866 So.2d 1231, 1233–34 (Fla. 2d DCA 2003). Finally, before bringing an action under subsection (1) of the statute an employee must provide the employer with "written notice and a reasonable opportunity to cure the lawful activity." *Golf Channel v. Jenkins*, 752 So.2d 561, 566 (Fla. 2000).

Smith claims GCYA retaliated against her because she objected to having to report abuse complaints to GCYA's management prior to reporting them to the state; objected to falsifying an internal log; and objected to the alteration of a form used by the defendants to document a youth's refusal to take prescribed medication. Smith also

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imported into the Whistle-Blower Act, but these cases merely hold that the Title VII burden-shifting scheme should be used when analyzing claims; this scheme comes into play only after an employee has identified an actual violation. Two other cases, *Padron v. BellSouth Telecom., Inc.*, 196 F. Supp.2d 1250, 1256 (S.D. Fla. 2002) and *Rivera v. Torfino Enters., Inc.*, 914 So.2d 1087, 1089 (Fla. 4th DCA 2005), involve allegations of acts which, if proven, would be "clearly" illegal, and thus there was no need for those courts to consider whether the employee's good faith belief was sufficient.

claims GCYA retaliated against her for reporting sexual and physical abuse occurring at the facility to DCF.

As a threshold finding, the court concludes that, with the exception of the abuse reports, Smith cannot show she engaged in conduct protected under the Whistle-Blower Act. There is no evidence before the court that the conduct about which Smith complains, if proven, would be a violation of a law, rule, or regulation within the meaning of the statute.[6] *See, e.g., Johnson v. Stein Mart, Inc.*, No. 3:06-cv-341, at *6, 2007 WL 1796265 (M.D. Fla. 2007). Regarding the abuse allegations, Smith has nothing to show that the abuse actually occurred. On the matter of the sexual abuse, Smith claims the control room operator approached her and said that the victim complained of being forced to masturbate in front of another youth. Smith also claims that the operator told her the operator and other staff had reviewed the security tapes and determined that the victim's complaint was true. In deposition, however, the control room operator denied telling Smith about the abuse. Additionally, although the video no longer exists, the operator testified she reviewed the tapes, and the conduct does not appear on them. Finally, the evidence shows that management and the state each investigated the report and found the allegations unsubstantiated. Regarding the report of physical abuse, Smith claims that a youth told her a staff

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[6] There is also no evidence Smith gave the defendants written notice and a reasonable opportunity to correct the alleged violation. *See Golf Channel*, 752 So.2d at 566.

member restrained and attacked him. Again, Smith has no admissible evidence showing this ever occurred; further, as with the alleged sexual abuse, management investigated and found the claim unsubstantiated. Lastly, with respect to both the sexual and physical abuse, it is undisputed that Smith did not report these incidents to defendants in writing prior to contacting the state.

The court finds Smith has no evidence that the defendants are responsible for violating a law, rule, or regulation within the meaning of the Whistle-Blower Act, and for that reason, summary judgment for defendants on Count I is GRANTED.

Count II: Sarbanes-Oxley Act

Smith also alleges defendants violated the Sarbanes-Oxley Act. This Act provides a private right of action to "whistleblower" employees who believe they have suffered a retaliatory act as a result of certain protected conduct, including providing information about or assisting in an investigation of various acts of corporate fraud. 18 U.S.C. § 1514A(a). To prevail on a whistleblower claim under Sarbanes-Oxley, the employee must show that (1) she engaged in protected conduct; (2) the employer knew that the employee engaged in the conduct; (3) the employee suffered an unfavorable personnel action; and (4) the protected conduct was a contributing factor in the personnel action. *Fraser v. Fiduciary Trust Co. Int'l*, 417 F. Supp.2d 310, 322 (S.D.N.Y. 2006).

In order to bring a claim under the Sarbanes-Oxley Act, an employee must first "file a complaint with the Occupational and Health Safety Administration ("OSHA") and afford OSHA the opportunity to resolve the allegations administratively." *Willis v. Vie Financial Group, Inc.*, No. 04-435, 2004 WL 1774575, *6 (E.D.Pa. Aug. 6, 2004) (citing 18 U.S.C. § 1514(b)(1)(A)).[7] The district court "can only conduct a 'de novo review' of those [Sarbanes-Oxley whistleblower] claims that have been administratively exhausted." *Bozeman v. Per-Se Tech. Inc.*, 456 F. Supp.2d 1282, 1357 (N.D. Ga. 2006) (citing *Willis*, 2004 WL 1774575 at *6; § 1514A(b)(2)(D); and 29 C.F.R. § 1980.103(b, d)). *See* also *McClendon v. Hewlett-Packard Co.*, No. 05-087-S-BLW, 2005 WL 2847224, *2-4 (D.Idaho Oct. 27, 2005) (holding that a district court can only conduct a "de novo review" of those claims that have been administratively exhausted). In *Bozeman*, 456 F. Supp.2d at 1358, the court concluded that because the plaintiff had "failed to specifically name [the proper defendants] in the heading of his administrative complaint," the defendants were entitled to summary judgment for plaintiff's failure to exhaust his administrative remedies. Similarly, in *Hanna v. WCI Communities, Inc.*, 2004 U.S. Dist. LEXIS 25652, *7-9 (S.D.Fla. Nov. 15, 2004), the court dismissed the plaintiff's Sarbanes-Oxley claim against the

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[7] Section 1514(b)(1)(A) provides for filing the administrative complaint with the Secretary of Labor. The Secretary has delegated that responsibility to OSHA. *See* 29 C.F.R. § 1980.103(e).

individual defendant whom plaintiff had failed to name as a respondent in his OSHA complaint. In the instant case, Smith did not name PBS or GCTC in the heading of her administrative complaint or indeed *anywhere* in her complaint. (Smith Depo., Ex. 15, doc. 75-8, 101–110.) Thus, Smith is unable to establish a claim against either of these defendants due to her failure to properly exhaust her administrative remedies with respect to them. *See Hanna*, 2004 U.S. Dist. LEXIS 25652 a *7-9. If at all, Smith's Sarbanes- Oxley whistleblower claim can lie against PSI, the only defendant named in her administrative complaint.

PSI argues it was not Smith's employer, and thus her claim against it fails. Smith maintains PSI was her employer. Under Sarbanes-Oxley, "employee" is defined as "an individual presently or formerly working for a company or company representative, . . . or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101. A "company representative" is "any officer, employee, contractor, subcontractor, or agent of a company." *Id.*

As a threshold matter, the court notes that Smith does not allege in her First Amended Complaint that PSI was her employer. Rather, Smith names GCYA—and only GCYA—as her employer. As noted, Smith obtained leave of court to change references in her complaint to the name of the corporation from GCYA to GCTC, but she

never sought or obtained leave to allege that PSI was her employer. PSI is entitled to summary judgment because Smith has not alleged that PSI was her employer, a necessary element of a Sarbanes-Oxley whistleblower claim. *See, e.g., Fraser*, 417 F. Supp.2d at 321–22.

Even if PSI were properly alleged to be Smith's employer, there is no evidence to support an employment relationship between PSI and Smith. Smith points to scant evidence of employment by PSI: a health insurance option sheet marked "Psychiatric Solutions Inc.," and the fact that a PSI official was sent to the GCYA facility to investigate her post-termination grievances. These items are legally insufficient to establish an employment relationship between Smith and PSI. The insurance sheet does not establish that PSI had control over Smith. *See Verchick v. Hecht Invs., Ltd.*, 924 So.2d 944, 945–46 (Fla. 3d DCA 2006) (finding that W-2 tax forms alone did not establish employment relationship). Nor does PSI's investigation, under these circumstances, evince an employment relationship. *See Russell v. Enter. Rent-A-Car Co. of R.I.*, 160 F. Supp.2d 239, 256 (D.R.I. 2001) (citing *Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24, 26–28 (1st Cir. 1980)) (discussing *Mas Marques*, where "parent company did express a willingness to investigate the plaintiff's discrimination complaint but did not concede responsibility for its subsidiary's actions").

On the other hand, there is voluminous documentary evidence to suggest that PBS and

GCTC were Smith's employers. This includes an employment application, employee handbook, paychecks, W-2 form, and Smith's termination letter. Smith also testified that her supervisors were employees of GCTC and that she was terminated by Kaplan, the CEO of GCTC. Moreover, at deposition, Smith consistently referred to her employer as GCYA/GCTC, not PSI.[8] Additionally, PSI insists that it was not Smith's employer and notes that the management of PSI is entirely distinct from the management of its subsidiaries. PSI also contends that it does not exercise day-to-day control over its subsidiaries and these subsidiaries maintain separate financial records. (Kaplan Decl. at ¶¶ 5, 6.) Jeff Kaplan, the CEO of GCTC, testified that GCTC determines its own policies, procedures, and forms. (Kaplan Depo. at 17.) Kaplan also holds no position in PSI or PBS. (*Id.* at 9, 11, 14.) This evidence is undisputed.

For all of the foregoing reasons, the court concludes that Smith is unable to establish a claim pursuant to the Sarbanes-Oxley Act against any of the defendants.

Defendants' motion for summary judgment on Count II is therefore GRANTED.

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[8] Q: "And when did you make that call [to PSI]?" A: ". . . it was many days after my employment when I was unable to get information from my employer as to whether I was still an employee." Q: "It was after you were—after you left the facility, correct?" A: ". . . When I did not hear back from my employer, I called PSI and asked for some help." Smith Depo. at 94.

Accordingly, it is hereby ORDERED that:

1. Plaintiff's Second Amended Complaint (doc. 104) is STRICKEN from the court's docket.

2. Plaintiff's Rule 72 objections (doc. 131) to the November 7, 2008, order of the magistrate judge are OVERRULED.

3. Defendants' motion (doc. 96) to strike plaintiff's declaration is GRANTED in part and DENIED in part as moot.

4. Defendants' motion for summary judgment (doc. 75) is GRANTED.

5. The clerk is directed to enter judgment for defendants and to close this case.

Plaintiff shall take nothing from this action.

DONE and ORDERED this 31st day of March, 2009.

/s/ M. Casey Rodgers
M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE